MEMORANDUM

TO: Members of the General Assembly

FROM: Bobby Sherman

SUBJECT: Supplement to Issues Confronting the 2000 General Assembly

DATE: December 8, 1999

Enclosed is a supplement to the publication, *Issues Confronting the 2000 General Assembly*, that presents a few additional issues and updates some issues presented earlier. The staff writer of a particular entry may be contacted for further information on the subject of that entry. I hope you find this material helpful.

TABLE OF CONTENTS

MANDATORY GARBAGE COLLECTION

Prepared by Kim Burch

Issue

Should the General Assembly require mandatory garbage collection?

Background

Proper disposal of household and commercial solid waste has long been a challenge for the Commonwealth. As recently as 1991, only 14 counties offered residents door-to-door garbage collection service. To help deter illegal dumps, the General Assembly passed a universal collection law in 1991. Universal collection requires counties to make garbage collection service available to all of its citizens. Collection service may include door-to-door household collection, direct haul to a staffed convenience center (collection boxes or dumpsters), or other alternatives proposed by the county and approved by the Cabinet. The statute does not, however, require citizens to participate in this collection service. Today, the Natural Resources and Environmental Protection Cabinet (the Cabinet) reports that 109 counties have door-to-door collection as their primary collection system.

While all counties are required to have universal collection, 23 counties have gone one step further, adopting a mandatory garbage collection policy that requires all citizens to participate in garbage collection service.

County solid waste reports for 1999 indicate that about 80% of Kentucky households participate in door-to-door collection or haul their garbage to transfer stations and convenience centers. It is not known how the remaining households dispose of their garbage, estimated at over 1,600 tons each day.

Improper disposal of solid waste may lead to illegal dumps that negatively affect the environment. Many studies show illegal dumps impact animal habitat, pollute waterways, clog creeks and cause flooding. County solid waste reports for 1999 identified 3,237 illegal dumps across the Commonwealth. In 1998, the Cabinet reported the cleaning of 2,132 illegal dumps at a cost of $4.0 million. Further costs may result from the loss of tourism dollars to the state and to local economies. Moreover, illegal dumps can create hazards for humans and wildlife. Households often discard many common items such as paint, cleaning products, oils, batteries, and pesticides that contain hazardous components. Leftover portions of these products are called household hazardous waste. When these products are improperly disposed of, they can become dangerous to health and the environment. Rodents, insects, and other vermin attracted to dump sites may also pose health risks. Dump sites with scrap tires provide an ideal breeding ground for mosquitoes,

which can multiply 100 times faster than normal in the warm, stagnant water standing in scrap tire casings.

Discussion

Mandatory garbage collection service would provide curbside or end-of-driveway collection for all households and would require all households to participate in this service.

Obvious environmental benefits include the reduction or elimination of trash at illegal dumps and cleaner hollows, sinkholes, and streams. Economic benefits result from efficiencies in haulers' costs due to countywide participation. Residents in counties with mandatory collection typically pay less for garbage collection service then residents in neighboring counties with universal collection.

The main concerns with requiring mandatory garbage collection are how to make residents pay their garbage bills, and how to ensure that collection service continues when residents are delinquent in paying those bills. Of the counties that currently require mandatory garbage collection, most seek payment of delinquent garbage bills through district court. Some counties pay private haulers for collection from county funds and then collect garbage fees from its residents so that private haulers continue service at all households regardless of who has failed to pay. Currently, some municipalities combine the garbage bill with another utility bill, such as the electric or water bill, to increase collection rates.

KRS 109.310 allows counties to collect garbage fees that are delinquent three or more consecutive months by combining the delinquent fees with the property tax bill for the property where the garbage is collected. A preventative option would be to allow the garbage fees to be placed on the property tax bill in advance of collection service. Another option would be for counties to establish reduced rates for low-income households.

The responsibility for providing a garbage collection system falls upon the county, as does any enforcement and reporting requirements that would accompany mandatory garbage collection. Still, local officials may be concerned about the cost of mandatory collection with no direct funding from the state, or a funding mechanism in place. Also, county officials may be concerned with the effect of a subscription requirement on low-income households.

HEALTH INSURANCE

Prepared by Greg Freedman

Issue

Should major changes to the health insurance system be enacted, or should the current law be given more time to work and attention be focused on other issues such as solvency and liability of managed care plans?

Background

The 1994 Kentucky General Assembly enacted major health insurance legislation in response to Kentuckians who claimed continuous large premium increases were making health insurance unaffordable. Kentucky was not alone; the issue crossed state lines and the Clinton Administration was proposing major health care reform legislation at the federal level. From 1993 to 1994, 44 percent of Americans who lost their jobs reported loss of health insurance, and almost half of fully employed persons with incomes below the poverty line had no insurance. Even before the health insurance reforms took effect in Kentucky in July 1995, opposition was being voiced to the changes, and soon more than 40 companies that provided some form of health coverage in the state stopped doing business in the state. The 1996 General Assembly responded by loosening the provisions on community rating and standard plans. Even with the legislative changes, choices declined in the individual market and premiums rose, particularly for the chronically-ill persons who benefited under a community rated system. A special session was called in 1997, but was adjourned without legislation being enacted. In 1998, the General Assembly pulled back further on the 1994 changes by abolishing community rating and the Health Purchasing Alliance, permitting companies to sell any policy in the individual and small group markets in addition to one standard plan, and creating the Guaranteed Acceptance Plan for persons with high-cost health conditions.

America's trillion-dollar health care system employing nine million persons is a vast, complex system that increasingly requires government subsidies or health insurance to access it. While the legislatures in Kentucky and other states have wrestled with the complex health insurance issue and Congress has enacted the Health Insurance Portability and Accountability Act, the number of uninsured persons in the United States has steadily risen from 14.2 percent of the population in 1995, to 15.3 percent in 1996, and to 16.1 percent in 1997. This percentage is actually higher at different times during any year because many Americans find themselves without health insurance for part of a year. And it is not just persons of low income who lack coverage. Eight percent of Americans with incomes in excess of $75,000 were uninsured in 1997. While the uninsured population has risen, the number of physicians treating patients has risen from 115 per 100,000 in 1970 to an estimated 203 per 100,000 in 2000. Although it appears physicians are more accessible,

20 percent of Americans live in rural areas and those areas are served by only nine percent of the nation's physicians.

Complicating this issue further is the debate over managed care. While Congress debates a patients bill of rights, Kentucky enacted its own protections in 1998 in response to concerns that managed care was restricting treatment patients needed. Managed care itself is a debatable issue. Nearly 70 percent of 6000 physicians surveyed in 1998 said they were against managed care. From 1986 to 1992 the growth in the incomes of physicians was 7.2 percent, but from 1993 to 1996 it was only 1.7 percent. Only one-third of health maintenance organizations in the United States recorded a profit in 1997; in Kentucky, 9 of the 17 domestic HMOs lost money in 1998. Four HMOs failed in the United States in 1998, and the Kentucky Department of Insurance took control of an HMO in Kentucky in 1999. Over 400,000 Medicare patients were dropped by HMOs in 1998.

Although managed care successfully rid the system of huge costs in 1995 and 1996, trends in utilization and cost of services have returned to the pre-reform levels of the early 1990's. Small businesses, the fastest growing sector of American employers, are also hard hit by this complicated issue and find themselves having to drop or reduce coverage for employees and shift from full-time employment to part-time employment. Rate increases averaged between 5 and 15 percent for 1998 and 1999 on group business coverage, while individual rate increases were higher. With unemployment rates near a 30 year low, it is apparent that the health insurance issue will be exacerbated with the next recession. While hospital spending still consumes the largest part of the health care dollar, growth in such spending has slowed. Now the fastest growing component of personal health care expenditures is prescription drugs.

Discussion

The 2000 Kentucky General Assembly can make minor changes to the state's health insurance laws, enact major changes, or take no action. Some persons contend that the health insurance issue can only be adequately addressed at the national level rather than by each state. They point to Kentucky's experience in enacting statewide changes. Proponents of major changes argue that the latest efforts of the legislature, the 1998 passage of HB 315, has not made health insurance more available nor affordable. The Guaranteed Acceptance Program (GAP) was created in 1998 to provide access to insurance for persons with high cost conditions. From July 1, 1998, through March, 1999, a total of 1,443 persons have enrolled in GAP. This number was reduced to 1,245 when 203 persons were removed for nonpayment of premium. Losses for the six month period ending December 31, 1998, amounted to $1,621,770.96.

Proponents of major change contend GAP is not a true high risk pool and Kentucky should scrap GAP and replace it with a pool similar to the ones established in Illinois or Mississippi. Proponents of major change also note that rates continue to climb even with the statutory rate bands. Some persons propose widening or eliminating the

bands and question the role the Attorney General should play in rate regulation. Proponents of major change point to the failure of past legislative enactments to draw insurance companies back to the Commonwealth, referring to the return of only two companies to the large group market and only one to both the small and large group market while the individual market remains served by only two domestic insurers. Some proponents of major change argue for the removal of guaranteed issue as allowed by the federal Health Insurance Portability and Affordability Act.

Opponents of major changes contend that such significant changes will contribute to the problem not to the solution. They contend insurers will not return to Kentucky if they believe each time the legislature convenes it will make major changes in the rules under which they must operate. They argue for fine-tuning of current laws and letting the market have a fair chance to work under the current system.

It has been argued that statutory **health insurance mandated benefits** are drivers of health insurance costs. Kentucky has 23 mandated health insurance benefits and four mandated offerings of benefits. Some contend that an insured should be given the option to waive those mandated coverages. Opponents counter that the purpose of insurance is to spread the cost and that if a waiver is allowed, only persons in need of the mandated benefits will buy them, and the cost will be high due to the small pool of persons purchasing such benefits. The Department of Insurance has reported that the mandated benefits enacted in 1998 increased premiums by about 2 percent.

Another health insurance issue is the **solvency of health maintenance organizations** (HMOs). Kentucky has a property and casualty guarantee fund and a life and health guarantee fund which requires insurers to pay claims of persons insured by a company that becomes insolvent. There is no such fund for HMOs that become insolvent. Nine of the seventeen HMOs in Kentucky lost money in 1998. On August 3, 1999, the Department of Insurance took control of MedQuest HMO in Owensboro which affected approximately 11,000 families.

There is also the issue of holding managed care plans liable for medical malpractice. It is contended that if a managed care organization overrules the medical decision of the treating physician, the managed care organization should be accountable for the medical decision. A bill on this matter, BR 428, was prefiled in Kentucky on September 10, 1999. Texas passed the first **"right to sue your HMO"** law in 1997. A U. S. District Court in September 1998, upheld an enrollee's right under the Texas law to sue a health plan for damages that results from the plan's failure to exercise ordinary care. It also struck down the ban on "hold harmless" clauses. Georgia has enacted legislation allowing patients to sue HMOs that deny or delay needed medical care. At least 30 states are considering over 90 bills relating to HMO liability.

Other issues pertaining to health insurance have been suggested for consideration by the 2000 Kentucky General Assembly. These include:

- An external review process should be adopted to handle complaints by enrollees in managed care plans.
- An incentive should be established to help employers fund a portion of the cost of health insurance for their employees.
- There should be a cap on liability exposure of health care providers.
- Competition should be encouraged at the provider level by repeal of the “any willing provider” law.
- Exposure of employers to greater liability should be minimized so that employers will not be forced to self-insure.
- Any legislative action should take into consideration the primary cost drivers of health insurance, which are the aging population, advances in medical technology, and increases in pharmaceutical costs.

Finally, there is growing concern about insurers' **delay in payment to health care providers** and **the practice of downcoding of services**. Delays in payment create cash flow problems for providers and increase their administrative costs. Although KRS 304.12-235 requires claims to be paid to the named insured or health care provider not more than thirty days from the date upon which notice and proof of claim are received, the statute is rendered meaningless if the insurer says it never received the claim. At least 24 states have introduced legislation in 1999 on this matter. A new law in Colorado requires "clean claims" to be paid within 30 days if submitted electronically and within 45 days if submitted by other means. A "clean claim" is one that has no material defect which prevents timely payment or one which the insurer has not notified the person submitting the claim of any defect.

Another issue in this area is downcoding. Standardized codes are used that indicate the level of treatment patients receive and providers are paid accordingly. Downcoding occurs when an extensive office visit with a patient with several health problems is reviewed by the insurer and is then coded as a simple office visit. Although this is a cost containment measure that is a contractual matter between insurer and provider, complaints have arisen that some insurers engage in the practice of automatically downcoding all treatments for a certain service. Downcoding is also a problem in emergency room care. A patient may come to the emergency room with presenting symptoms of an emergency and receive expensive tests to determine whether the problem is an emergency. If it is determined not to be an emergency or turns out to be a more routine diagnosis, the provider is not reimbursed for the tests for the more complicated diagnosis but is paid for treatment of the simple diagnosis.

SUPPORTS FOR COMMUNITY LIVING

Prepared by Murray Wood

Issue

Should the General Assembly increase funding for community-based services to persons with mental retardation or other developmental disabilities?

Background

The Supports for Community Living (SCL) program is a home and community-based waiver in Kentucky's Medicaid program that provides funding for services to persons with mental retardation or other developmental disabilities who qualify for residential or institutional care and who prefer to receive services in their home communities. The types of services typically associated with the SCL program include community habilitation, supported employment, support for household and self care, physical and speech therapy, emergency response systems, and medical equipment and supplies.

Approximately 1,100 individuals are served in the program, and an additional 1,400 persons are on a community service waiting list. These persons are approved for Medicaid-funded services but are not receiving them because the services are not available in the community or because local service providers are operating at capacity and cannot accept additional clients. A number of persons are on the waiting list due to an emergency or crisis situation. One such person is a 40-year old mentally retarded individual who lives with aging parents, with no other caregiver. This individual would be institutionalized if the parents became disabled or were otherwise unable to provide care. Some individuals have been on the waiting list since 1984 and are still not receiving services.

A 1998 United States Supreme Court case, *Olmstead v. L.C.*, held that "unjustified isolation" in state mental institutions discriminates under the Americans with Disabilities Act and that a person with a mental disability should be cared for in a home-like setting, if treatment professionals determine that a less-restrictive community placement is appropriate and the person affected approves the move. According to *Olmstead*, the placement must be "reasonably accommodated, taking into account the resources available to the state."

Discussion

State general fund dollars create the match for federal Medicaid funds. Mental health professionals note that Kentucky ranks 48th in the nation in funding for services to

persons with mental retardation and developmental disabilities. SCL funding through Medicaid reimbursement averaged $50,000 per person during FY 99. The average cost for supporting an individual who was not in the SCL program was $77,858 in a state institution and $58,142 in a private institution.

An important factor in the debate between institutional versus community living is the availability of appropriate community-based services for this population. Flexibility in service design and funding is important to promote the development of new services and enhance existing services. Each person's abilities and needs differ; to be effective in maintaining the individual in the community, service plans and providers must reflect individual needs.

While it is generally less expensive to provide an array of community services than to provide care in a residential or institutional setting, the discussion about closing the Intermediate Care Facility for Mental Retardation at Central State Hospital (CSH) in Louisville has generated a high level of concern among family members. Many family members testified at legislative hearings about their preference for the institutional care for their affected family member. Kentucky law grants appeal rights to the parent or guardian if there is disagreement about moving a patient or about changes to the treatment plan (KRS 210.270). The 43 patients at CSH have been added to the SCL Medicaid waiver, which some believe may result in state inefficiency by necessitating Medicaid payments for community services for patients who move into communities while simultaneously requiring staffing, services, and administration costs for the remaining residents of CSH. None of the 43 persons has been relocated at this time.

In 1992, New Hampshire closed its last state institution. This closing met with a lawsuit on behalf of mentally retarded citizens who did not want to be moved. Community residential centers for the citizens were reduced from 6-8 people per residence to an average of 2.5 people per residence. Smaller homes have meant fewer behavioral problems, greater commitment to the individual's needs, and fewer problems from citizens who do not want large mental institutions in their neighborhood. In FY 99, New Hampshire's state and federal funds totaled $109 million, but the cost of community-based care is one-half the cost of institutional care. Many other states are grappling with the problem of deinstitutionalization. Georgia, for one, is looking to tobacco settlement funds as a means to offer more community services.

GUARDIANS AD LITEM

Prepared by Scott Varland

Issue

Should the General Assembly increase the responsibilities and funding of Guardians ad Litem in Kentucky?

Background

Guardians ad Litem (GALs) are attorneys appointed by the courts and paid by the Commonwealth to represent the interests of children during the litigation of approximately 10,000 dependency, neglect, and abuse petitions filed each year.

In 1998, the Auditor of Public Accounts conducted a major study and issued a report titled Guardian ad Litem Practices in the Commonwealth of Kentucky. The report made several recommendations for increasing the responsibilities and training of GALs and for improving administration of the GAL system.

Following up on the effort of the Auditor of Public Accounts, Chief Justice Joseph E. Lambert appointed a Commission on Guardians ad Litem. The Commission began work in May 1999, and published its report October 25, 1999. This report included recommendations in the same vein as, but more detailed than, the Auditor's recommendations.

Discussion

Proponents of an omnibus revision to the GAL system seek changes in several areas to better serve the needs of children. The proponents would increase responsibilities, training, oversight, and funding of GALs while improving the administration of the entire system. The proponents would address the training, oversight, and administration issues through Kentucky Supreme Court Rules, administrative regulations, Kentucky Bar Association Rules, and Kentucky Bar Association activities. The proponents would increase responsibilities and funding through legislation.

With regard to increasing responsibilities of GALs, proponents note that current law, KRS 387.505(5), requires only that a GAL advocate for the child's best interests. Proponents want to expand on this requirement by mandating best GAL practice. A GAL should: determine the facts of the case; meet with the child and assess his or her needs and wishes; explain the proceedings to the child; appear at all hearings concerning the child; make recommendations for specific and clear orders pertaining to the child and the

child's family; file all necessary pleadings and papers and maintain a complete file with notes; monitor the implementation of court orders and determine whether services ordered by the court for the child and the child's family are being provided; continue representation so long as the appointing authority retains jurisdiction over the child; consistent with the Rules of Professional Responsibility, identify common interests among the parties and promote cooperative resolutions of issues; consult with persons knowledgeable about the child and the child's family to identify appropriate services and placement for the child; submit an oral or written report to the court; and advocate the child's best interests, but advise the court when the child disagrees with the GAL's opinion as to what are the child's best interests.

With regard to increasing funding, proponents argue that GALs are underpaid at present. They receive a maximum of $250 for a case resolved in District Court and a maximum of $500 for a case resolved in Circuit Court. Proponents reason that if GALs are given increased responsibilities without an increase in pay, the GALs will be even more underpaid. Therefore, they propose GALs should receive an increase in pay based on work performed at each step in the process including District Court, Circuit Court, appeals, and reviews. The increase in pay will increase the cost of the GAL program threefold to between $7.5 million and $9.5 million per year.

Opponents of an omnibus revision to the system argue that the current system could be fixed by more attorneys acting as GALs on a pro bono basis. They state that the proposed system will discourage attorneys from acting as GALs on a pro bono basis because it will increase training, responsibilities, and oversight of GALs. They also assert that the proposed system may not be worth the threefold increase in cost and that a bureaucracy will have to be invented to run the new system.

WRONGFUL DEATH

Prepared by Jonathan Grate

Issue

Sho

Background

Kentucky's wrongful death statute currently does not allow an adult decedent's adult relatives to recover for their emotional damages resulting from by the decedent's death. Aside from funeral and medical expenses, the general measure of damages is for recovery of the decedent's lost earnings.

Discussion

Groups favoring inclusion of emotional damages point to the inadequacy of damages limited to earning power in a number of situations, particularly those where the decedent possessed little or no earning power. This may be the case where the decedent had been disabled prior to the death, or where the decedent was elderly and infirm. In both cases, proponents of the change argue that these individuals, while not possessing a high earning capacity, had value as individuals and as members of society and that their lives were worth far more than the small value a measure of economic earning power would put on their lives. Moreover, proponents point out that the availability of civil damages encourages persons to take care in their conduct and not to act negligently or recklessly. They also suggest that a system giving only minimal damages lessens the incentive to others to take care in their actions. Finally, proponents believe that a number of people, when seeking legal relief for a decedent's death are forced, by virtue of the high fees involved in modern litigation, to utilize a contingent fee arrangement with an attorney to take the case to court. However, given the probability of a low recovery due to a restriction of damages to economic earning power, proponents believe that many potential litigants face severe difficulty in finding an attorney willing to take the case on a contingent fee basis. Thus, the decedent's relatives feel they have been denied an opportunity to be heard and for justice to be done.

Groups opposing amending the statute express concern for those who would risk increased liability exposure under an amended law. While not disputing the value of a human life, those groups argue that monetary damages are not a good means for compensating for the loss of that life. Additionally, given that monetary damages are the primary means by which redress is made in the court system, opponents point out that assessing monetary damages for emotional harm to a number of relatives would be a very

subjective process, varying from jury to jury, with potentially widely disparate results for similar cases across Kentucky. Also, opponents argue that current law already provides enough incentive for persons to act carefully and that allowing additional damages would do little to encourage additional careful behavior. Opponents argue that instead, the primary effect of amending the law would not be a higher standard of behavior but a greatly increased cost of doing business, as institutions, insurance companies, and other entities would be forced to include the amount of these damages in their cost of doing business and would pass these costs on to consumers. They argue that these higher costs may discourage consumers from seeking these services and this reduction would cause more harm to society as a whole than any additional caution brought on by allowing additional damages.

POSTING THE TEN COMMANDMENTS IN PUBLIC SCHOOLS

Prepared by Laura H. Hendrix

Issue

Should the General Assembly enact additional legislation to provide for the posting of the Ten Commandments in public schools?

Background

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Kentucky Constitution's Bill of Rights, Section 1(2) provides that people have the right of "worshipping Almighty God according to the dictates of their consciences." The Kentucky Constitution, Section 5, provides that:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute the erection or maintenance of any such place, or to salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

Additionally, Section 189 of the Kentucky Constitution prohibits funds for public schools from being used to support "church, sectarian, or denominational schools."

In 1978, the General Assembly passed a law providing that the Ten Commandments be displayed in every public elementary and secondary school in Kentucky. Copies of the Ten Commandments were to be purchased with voluntary contributions, and were to contain the notation that "the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The law, codified at KRS 158.178, was challenged in court by the Kentucky Chapter of the American Civil Liberties Union in the case of Stone v. Graham. In this case, the posting of the Ten Commandments was upheld in 1980 by the Kentucky Supreme Court in an equally divided opinion. Upon appeal to the United States Supreme Court, the court held that KRS 158.178 was violative of the Establishment Clause of the First Amendment to the United

States Constitution. The court held that, despite the law's notation that the Ten Commandments had a secular purpose and that the copies were to be purchased with private funds, the purpose of the Ten Commandments' posting is religious in nature and the mere posting provided the governmental support that the 1st amendment to the U.S. Constitution prohibits. The court held that the Ten Commandments are a "sacred text". Despite the ruling, KRS 158.178 was not repealed by the General Assembly.

Following several highly publicized school shootings in Kentucky and other states in the late 1990's, many persons opined that juvenile violence has emerged from public schools' lack of moral and ethical standards for student conduct. As a consequence, many public schools and other governmental bodies have resumed posting the Ten Commandments. Additionally, several state legislatures and the Congress have introduced and enacted several bills that refer to the Ten Commandments. In the U.S. House of Representatives, an amendment was passed as part of a 1999 Juvenile Justice bill, H.R. 1501, that promotes the display of the Ten Commandments in public schools and other public buildings. The bill was passed by the U.S. House and Senate, and is currently in conference committee. In the 1998 Regular Session, the Kentucky General Assembly passed a bill, House Bill 2, that delineated religious liberty rights of students, including the right to pray during noninstructional times.

Several bills have been prefiled for the 2000 Regular Session of the General Assembly that refer to the Ten Commandments. 00 RS BR 455 would provide for a school district referendum on the posting of the Ten Commandments and, if the referendum is passed, provide that the posting be in conjunction with a curriculum based on the historical impact of the Ten Commandments. 00 RS BR 366 would provide that school based decision making councils would determine whether and where to post copies of the Ten Commandments. A related bill, 00 RS BR 186, would provide that students may pray during noninstructional times and would repeal the provisions of 1998 RS HB 2.

The Kentucky chapter of the American Civil Liberties Union has recently filed suit against a school district that has posted the Ten Commandments. The insurance carrier for Kentucky school boards has stated that the insurance it provides will not pay to defend lawsuits brought against school boards that may arise if schools post the Ten Commandments. The Kentucky Attorney General's Office was asked to opine as to whether these bills to post the Ten Commandments were permissible; however, the office has declined to offer an opinion, citing potential litigation.

Discussion

The U.S. Supreme Court's ruling in Stone v. Graham is clear that the court considers the Ten Commandments to be a sacred text, and that the posting of a sacred text by a governmental body is considered to be violative of the 1st Amendment, and the argument could be made that such posting would violate similar provisions of the Kentucky Constitution. Additionally, the issue of determining by school district

referendum whether the Ten Commandments should be posted raises an issue under the Kentucky Constitution, Section 60. This section of the Kentucky Constitution provides that "no law…shall be enacted to take effect upon the approval of any other authority than the General Assembly." This section has been used in the past to strike down referenda which attempt to pose questions to the general public that should be considered by the legislature. Although the section does provide for an exception for "matters pertaining to common schools", it is unclear whether the courts would extend that exemption to permit a school district referendum on the posting of the Ten Commandments. Also, Section 59(25) provides that local or special laws shall not be enacted to provide for the management of common schools. An additional question would arise with the legality of placing a constitutional right, such as the right to be free of state-sponsored religion, up for a popular vote, as the purpose of the Bill of Rights is to secure certain rights free from the encroachment of the majority.

Proponents of bills which would allow for posting the Ten Commandments state that violence and general disrespect for authority is rampant in the public schools, that moral and ethical values should be taught in all public schools, that the Ten Commandments represent the values which all children should believe in, that the majority of those in a community should determine the values of the community, and that the Supreme Court's decision in Stone v. Graham was incorrect and should be overturned. Opponents of posting state that the incidence of violent crimes among youth has actually decreased and that posting will not have any effect on crimes among youth, that posting violates the 1st Amendment, as interpreted by the U.S. Supreme Court in Stone v. Graham, that posting of religious texts violates parents' rights to raise their children in a way that conforms to their religious heritage, that posting promotes divisiveness and exclusion of those children who do not happen to believe in the Ten Commandments, and posting violates the principle that schools should teach religiously neutral values. Other commentators have urged that parents take the lead in instructing their children in values, and that schools concentrate on promoting religion-neutral values, character-building, and civic education as a way to further impart to students that they need to respect, and not hurt, other students.

IMPLEMENTING A RAILS-TO-TRAILS PROGRAM IN THE COMMONWEALTH OF KENTUCKY

Prepared by Ellen Benzing

Issue

Should the General Assembly implement or facilitate a rails-to-trails program in the Commonwealth?

Background

Twentieth century economic and transportation changes, such as increased reliance on trucks and airplanes, have led to a major contraction in the nation's railroad infrastructure, with a resultant increase in the number of abandoned railroad corridors. Governments at the state and national level have thus been faced with the question of whether government should utilize or preserve these corridors in some way. One option has been the development of railtrails; i.e. the conversion of abandoned or unused railroad corridors into public multi-use trails or greenways.

At the national level, Congress has taken the trail idea and fused it with a desire to preserve a transportation infrastructure for future use, should the need ever arise. To promote this policy, Congress amended the National Trails System Act in 1983 to allow an about to be abandoned railroad corridor to be preserved by "banking" that corridor for future railroad use and using that corridor in the interim for a recreational trail.

The power to bank an abandoned corridor has greatly facilitated the conversion of these corridors into railtrails. States, local governments, and public and private interest groups have transformed thousands of miles of corridors into multi-use trails or linear parks for public enjoyment. In light of the present Rails-to-Trails movement and the efforts of adjoining states such as West Virginia and Ohio with 376 and 374 miles respectively, the 1998 Regular Session of the Kentucky General Assembly adopted House Concurrent Resolution 77 directing the Legislative Research Commission to establish a special interim committee to study the benefits, feasibility, and implementation strategy for a Rails-to-Trails Program in the Commonwealth of Kentucky. The questions before the Task Force centered on what efforts, if any, should be undertaken to develop a railtrail system in Kentucky.

Discussion

Testimony before the Task Force from state and local governments, intergovernmental organizations, and interest groups conveyed the economic, health, and

environmental benefits of railtrails. Representatives from Ohio and West Virginia discussed how their states maintained successful railtrail programs and noted the resultant benefits of their states' programs. Executive Branch agencies addressed existing mechanisms which may facilitate a rails-to-trails program. Railroad companies raised timing concerns about a potential state railbanking law and safety concerns associated with trails located next to currently active railroad lines. The Farm Bureau raised objections to a rails-to-trails program on behalf of adjacent landowners, while offering to work with the Task Force on reaching a middle ground.

At the conclusion of the Task Force's work, a set of twelve recommendations in regard to the Rails-to-Trails question in the Commonwealth were submitted to the Legislative Research Commission for consideration by the 2000 Regular Session of the Kentucky General Assembly. Those twelve recommendations are set out below. The first nine recommendations require the enactment of legislation, with the seventh recommendation additionally requiring an appropriation. The remaining three recommendations do not necessarily require the enactment of legislation but may be done on an agency's own initiative.

Recommendations Requiring Enactment of Legislation

1) Have one central person in an appropriate state agency who is responsible for monitoring inter-agency collaboration on railtrail efforts and disseminating railtrail information, including accepting notices of railroad abandonments; alerting interested local governments, state agencies, and private groups; and providing information about available funding options (including TEA-21 applications).

2) Reauthorize the Task Force, perhaps including representatives from interested railtrail entities such as state government agencies and/or private interest groups. The focus could be on working with any physical assessment of corridors and creating a statewide plan for creating railtrails.

3) Have the Transportation Cabinet notify the Department of Parks of railroad abandonments.

4) Have the Transportation Cabinet keep a record of abandoned railroads in Kentucky.

5) Require that state agencies which receive abandonment notices (such as the Public Service Commission and the Historic Preservation Office) immediately forward those notices to the trail coordinator in the Kentucky Department of Parks.

6) Require the trails coordinator in the Kentucky Department of Parks to send letters to the Area Development Districts, local historical societies, local Chambers of Commerce, reauthorized task force members, the Kentucky Association of Counties, and any other pertinent local government organizations, notifying them of the potential for railtrail development in the Commonwealth.

7) Do a complete assessment of the abandoned railroad corridors in Kentucky (much like in West Virginia), including an on-the-ground assessment of the corridor's physical condition and the feasibility of converting it to a railtrail. Recommend that the corridors be mapped electronically with data convertible to internet format and create a website setting out the data and linking it to local tourism sites.

8) Recommend the enactment of a state railbanking law that provides for an increased time period for notices of railroad corridor abandonment, increases the number of entities notified of railroad corridor abandonments, allows for corridor preservation under Kentucky law, and excludes unsuitable properties from railtrail conversion.

9) Recommend legislation be created that specifies that the conversion of a corridor to a railtrail, with a provision for possible restoration of future service, is consistent with a railroad easement.

Recommendations Not Requiring Enactment of Legislation

10) In addition to other efforts, work with the mechanisms already in place which provide for inclusion of railtrails in the Kentucky Trails System.

11) Have the Department of Parks comply with KRS 148.690(1) and (2), which provide that the Department of Parks shall review all formal declarations of railroad rights-of-way abandonments by the Surface Transportation Board for possible inclusion in the Kentucky Trails System.

12) Have an appropriate agency, such as the Trails Coordinator in the Kentucky Department of Parks, develop a "how-to manual" which explains the process for acquiring, funding, and developing a railtrail in Kentucky.